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IN THE

Supreme Court of The United States

October Term, 1964

No. 741

ELBERT MOORE, INC.
a Florida Corporation,

Petitioner,

—vs—

RAY E. GREEN, Comptroller
State of Florida,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OPINIONS BELOW

The reference by the Petitioner to the opinions of the Florida Courts is accepted without dispute.

JURISDICTION

Respondent has no quarrel with the recitation, as such, of the provision of the United States Code alleged to form

the basis of the instant petition; except to the extent that it is the position of the Respondent that the instant petition as well as the record reflecting the proceedings fail to support Petitioner's allegations.

QUESTION PRESENTED

Respondent has no quarrel with the question presented, as such, except to the extent that it is the position of the Respondent that the instant question fails to present a substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent has no quarrel with the recitation of the Constitutional provisions and statutes alleged to be involved except to the extent that Petitioner has omitted reference to Section 212.08(7), Florida Statutes, which section was material to the disposition of the opinion below. (Appendix to Respondent's Response to Petition for Writ of Certiorari, pages A1, A2).

STATEMENT

Despite the fact that the resume of the facts contained in Petitioner's statement leaves room for differences of interpretation and does not contain all the pertinent findings of the Court below, Respondent will accept it as set out by Petitioner in its brief. A more accurate statement may be found in the opinion of the District Court of Appeal of the State of Florida set out in Appendix "B", pages 17-20 of the Petitioner's Petition for Writ of Certiorari.

REASONS FOR DECLINING TO GRANT THE WRIT OF CERTIORARI PRAYED FOR BY PETITIONER

The underlying principle governing this Court's review on certiorari is that the, "State Court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Rule 19, Supreme Court Rules, Title 28, USCA)

An examination of the proceeding before the Florida Courts below would indicate the absence of a substantial federal question On the contrary, the decisions sought to be reviewed are based upon independent non-federal grounds. In this regard this Court has long followed its self-imposed principle to decline to review the judgment of a State Court based upon an adequate and independent non-federal ground without regard to whether a federal question was involved. *George O. Richardson Machinery vs. Scott*, Okla., 1928, 48 S.Ct. 264, 276 U.S. 128, 72 L.Ed. 497. See also *Pierce vs. Somerset Railway*, 171 U.S. 641, 19 S.Ct. 64, 43 L.Ed. 316; *Leonard vs. Vicksburg, Shreveport and Pacific Railroad Co.*, 198 U.S. 416, 25 S.Ct. 750, 49 L.Ed. 1108; *Utley vs. City of St. Petersburg, Fla.*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155; *Lynch vs. New York ex rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191; *Brooks vs. Missouri*, 124 U.S. 394, 8 S.Ct. 443, 31 L.Ed. 454; *Buck vs. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775. See also annotations 100 L.Ed. 1200, 1203-6; 84 L.Ed. 925, 940, et seq.

This Court has consistently held that it is essential to show that not only must a State Court's decision rest on a federal question but it must also appear that a decision as to such question was *necessary* to the State Court's determination. *DeSaussure vs. Gaillard*, 127 U.S. 216, 8 S.Ct. 1053, 32 L.Ed. 125. *Lynch vs. New York ex rel. Pierson*, supra.

If we were to strip away the superficial allegations of the Petitioner with respect to the application of the Commerce Clause, it would be instantly apparent to this Court that the disposition of this case rested entirely on state grounds. The pivotal point of the decisions of the Florida Courts below was whether the Petitioner, in the business of leasing of trucks to a person later using them in interstate commerce, was a "common carrier" and thereby entitled to an exemption from the sales tax on the rental of motor vehicles within the State of Florida as imposed by Sections 212.05(3) and 212.08(3), Florida Statutes. (Appendix "A", pages 9-11 of Petitioner's Petition). The highest Court in Florida had previously construed the exemption from taxation provision as set forth in Section 212.08(7), F.S., as being available only to "common carriers." *L. B. Smith Aircraft Corp., vs. Green*, Fla., 1957, 94 So.2d 832.

This Court has previously held that an interpretation of the statutes by the State's highest court is binding upon the Supreme Court. *Scripto, Inc. vs. Carson*, Fla., 1960, 80 S.Ct. 619, 362 U.S. 207, 4 L.Ed. 2d 660; *Kedroff vs. St. Nicholas Cathedral of Russian Orthodox Church in North America*, N.Y., 1952, 73 S.Ct. 143, 344 U.S. 94, 97 L.Ed.

120. Of particular significance is this Court's decision on this point in *Bacon and Sons vs. Martin*, Ky., 1939, 68 S.Ct. 61, 305 U.S. 380, 83 L.Ed. 233.

Consequently, when the Petitioner came before the Florida Courts, it was necessary to examine the facts in order to ascertain whether Petitioner was a "common carrier" so as to be entitled to exemption from taxes. In the opinion of the Circuit Court, the Petitioner was not such a "carrier" as to be entitled to such exemption, the following observation being made:

> "In the case at bar, the tax is one imposed upon a rental agreement entered into in Florida between two citizens of Florida which applies to the movement of the leased vehicles regardless of whether they are used in 'common carriage' (which they are not), 'contract carriage' (which they are sometimes), or for private use, (which they are sometimes). There is absolutely no relationship between the tax and the use to which the truck is put. *The tax is not upon the carrier.* It is not upon the act of carriage as such. It is not a tax upon, or measured by the charges made for carriage. It is a tax upon the leasing of the equipment which is something entirely different." (Emphasis supplied). (Appendix "B", page 15, Petitioner's Petition).

When the District Court of Appeal of Florida affirmed the Circuit Court's decision, the following pertinent statements were made:

"It is agreed that neither appellant nor its lessee, Lykes Bros., Inc., is a common carrier of persons or property, nor are the trucks in question used as a part of any system of common carriage . . . Even should the exemption provision of the statute be so broadly interpreted as to exempt from the sales tax both contract carriers as well as common carriers who transport persons or property in interstate or foreign commerce, it is our view that appellant would nevertheless not qualify for the exemption granted by the statute. The facts in this case disclose that the primary use of the trucks leased by Lykes from appellant is for transporting Lykes' personally owned property from middle and western states of this country into Florida for use in connection with its own business. The contract carriage phase of Lykes' operation is merely incidental to its principal corporate function, and was undertaken only for the purpose of minimizing the economic waste which would result if the trucks returned to the middle and western states empty and without a payload of any kind. The words 'vehicles . . . used to transport persons or property' as contained in the exemption statute were intended to convey the meaning of a permanent rather than temporary or part-time use. The incidental use of the trucks for contract carriage would not bring the rentals received under the lease within the exemption provision of the statute." (Ap-

pendix "B", pages 19-20, Petitioner's Petition). (Emphasis supplied)

It is patently evident, therefore, that the decisions of the Florida Courts rested on non-federal grounds. In fact, the concluding statement made by the District Court of Appeal best sums up the value of Petitioner's contentions regarding the alleged federal question:

> "We have considered the remaining points on appeal in which it is contended that the tax in question is invalid as an imposition upon interstate commerce and as an income tax, both in violation of the Florida and Federal Constitutions. We find these contentions to be without substantial merit. The decree appealed is according affirmed."
> (Appendix "B", page 20, Petitioner's Petition).

The absence of any substantial federal question is further evidenced by the holdings of the highest court in Georgia, Ohio and Tennessee. The decision in *Oxford vs. Blankenship*, Ga., 1962, 127 S.E. 2d. 706; *Alside Inc., vs. Bowers*, Ohio, 1963, 190 N.E. 2d. 274; and *Central Transportation Co. vs. Atkins*, Tenn., 1957, 305 S.W. 2d. 940, cert. denied 355 U.S. 913, 2 L.Ed. 2d. 274, 78 S.Ct. 343, as cited by Petitioner in its brief (pages 5 and 6) are consistent with the conclusions reached by the Florida Courts on substantially similar factual situations. See also *Ruke Transport Line, Inc. vs. Green*, Fla., 1963, 156 So.2d. 176.

Of particular significance and interest is the reference in the *Bowers* and *Blankenship* cases, supra, to this Court's decision in *Eastern Air Lines Transport Co., Inc. vs. South Carolina Tax Commission,* 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673, to the effect that a tax upon local sales of items used in conducting a business which constitutes interstate commerce *is not* regarded as imposing a direct burden on interstate commerce so as to make the sale immune from a non-discriminatory tax.

It should be noted further, that the Petitioner previously filed a petition for Certiorari in this Court on December 12, 1963, involving substantially the same matters as the instant petition which this Court denied on February 17, 1964 (see page 2 of Petitioner's brief).

CONCLUSION

A careful review of decisions by the Florida Courts and the reasons supporting such holdings reveal that the conclusions reached therein are in accord with the applicable decisions of this Court. The record of the proceedings below is devoid of any indications that the Florida Courts decided a federal question of substance not theretofore determined by this Court; nor can we glean from the said record any showing that the construction of Florida's statutes is in any manner repugnant to the Constitution, treaties or laws of the United States.

WHEREFORE, in light of the foregoing, Respondent respectfully requests this Honorable Court to dismiss the instant Petition for Certiorari.

Respectfully submitted,

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GERALD MAGER
Assistant Attorney General

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Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida was mailed this 31st day of December, 1964 to Honorable John R. Lawson, Jr., Post Office Box 1283, Exchange Bank Building, Tampa, Florida, Attorney for Petitioner.

GERALD MAGER

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FLORIDA STATUTES

*212.08 Same; specified exemptions.—The sale at retail, the rental, the use, the consumption, the distribution and the storage to be used or consumed in this state, of the following tangible personal property, is hereby specifically exempt from the tax imposed by this chapter.

(7) EXEMPTIONS; POLITICAL SUBDIVISIONS, INTERSTATE TRANSPORTATION, COMMUNICATIONS, ETC.—There shall also be exempt from the tax imposed by this chapter sales made to the United States government, the state or any county, municipality or political subdivision of this state; provided, this exemption shall not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof where such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision thereof, except public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959. *Also exempt are vehicles and parts thereof used to transport persons or property in interstate or foreign commerce.* Likewise exempt are newspapers, communication services, film rentals, and charges for services rendered by radio and television stations, including line charges, talent fees or charges, and charges for films and transcriptions and other expendable items in producing radio or television broadcasts. (Emphasis supplied).

*Amended and renumbered in 1963 to read as follows:

212.08 Sales, rental, storage, use tax; specified exemptions.—The sale at retail, the rental, the use, the consumption, the distribution and the storage to be used or consumed in this state, of the following tangible personal property, is hereby specifically exempt from the tax imposed by part I of this chapter.

(10) PARTIAL EXEMPTIONS, VEHICLES ENGAGED IN INTERSTATE OR FOREIGN COMMERCE. — Vehicles and parts thereof used to transport persons or property in interstate or foreign commerce are subject to tax imposed in part I of this chapter only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage travelled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases by the carriers of vehicles and parts thereof which are used in Florida to establish that portion of the total used and consumed in intrastate movement and subject to tax under part I of this chapter, subject to the provisions of §212.08(4).